

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review –)	MB Docket No. 02-277
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations)	MM Docket No. 01-235
and Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations)	
in Local Markets)	
)	
Definition of Radio Markets		MM Docket No. 00-244

COMMENTS OF

ARSO RADIO CORPORATION

Arso Radio Corporation (“Arso”)¹ submits these comments in response to the Commission’s *Further Notice of Proposed Rulemaking*² as one of the Petitioners that filed Petitions for Reconsideration of the Commission’s *2002 Biennial Review Order*³ to refresh the record as suggested in Paragraph 36

¹ Arso is an FCC licensee of broadcasting facilities located in Puerto Rico.

² *Further Notice of Proposed Rulemaking* in MM Docket Nos. 06-121,02-277,01-235,01-317, and 00-244, FCC 06-93 (rel. July 24, 2006)(“*Further Notice*”)

³ *See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13711-47 (2003) (“*2002 Biennial Review Order*”), *aff’d in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004) (“*Prometheus*”), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) (“*Prometheus Rehearing Order*”), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

of the *Further Notice* order and to further comment on the issues raised in the *Further Notice*.

For purposes of these comments, ARSO by necessity incorporates its previously filed Petition for Reconsideration of the *2002 Biennial Review Order*. As noted in the *Further Notice*, the *Prometheus* decision did confirm that the Commission acted within the scope of its authority in redefining “markets” for purposes of multiple ownership from a contour overlap methodology to using Arbitron radio “Metro” markets, finding that such a decision was a “rational exercise of rulemaking authority”⁴. However, neither the *Prometheus* court nor the Commission has addressed the crux of ARSO’s argument relating to the decision to adopt the Arbitron “Metro” definition in Puerto Rico as the appropriate definition of a radio market for purposes of calculating permissible local ownership limitations. ARSO has requested, in its Petition for Reconsideration, and reiterates such request via these comments, that (i) the definition of the Puerto Rico Radio Market be modified to reflect the geographic and social realities of the island in accordance with the definitions propounded by the Office of Management and Budget, or (ii) an exception be created for the definition of Radio Market for Puerto Rico in accordance with past Commission precedent or (iii) the Puerto Rico radio market be defined in a similar fashion as those markets not in an Arbitron Survey Area (as is pending in MM Docket 03-130).

Background

In the *2002 Biennial Review Order*, the FCC adopted the Arbitron Metro Survey Area (“Arbitron Metro”) as the definition of radio market for the purpose of determining compliance with the local radio ownership rule.⁵ In adopting the Arbitron Metro, the *2002 Biennial Review Order* reasoned that “*Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio ratings service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets – Arbitron Metros – are Arbitron’s primary survey area, **which in turn are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB) (emphasis added)***”⁶ The *2002 Biennial Review Order*, in footnote 573, provided a further explanation of MAs and provided reference material concerning the methodology the OMB used in defining MAs and a link to information about the most recent MA listing, incorporating data from the 2000 census. The *2002 Biennial Review Order*, in reaching its conclusion to use the Arbitron Metro, argued that “people in the United States tend to be

⁴ *Prometheus*, 373 F.3d at 425.

⁵ *2002 Biennial Review Order* paragraph 273

⁶ *2002 Biennial Review Order* at 275

clustered around specific population centers”⁷ and adopted one commenter’s position that “Radio stations compete in Arbitron markets”⁸. As a result, the *2002 Biennial Review Order* concluded that the Arbitron Metro was the appropriate standard for the purpose of calculating compliance with the local ownership rule.

Comments

The Commission’s adoption of and reliance upon Arbitron’s Metro definition was predicated on the assumption (as noted above) that the Arbitron Metro was, in turn, based on the OMB’s Metropolitan Areas (MAs). Indeed, the *2002 Biennial Review Order* extensively footnoted (in footnote 573) how the OMB defined Metropolitan Areas and where to find the most updated information concerning the MAs. This assumption is likely correct in most of the United States but it is completely erroneous when applied to Puerto Rico. Arbitron’s Metro definition for Puerto Rico is the **ENTIRE** island of Puerto Rico.⁹ However, the OMB does **NOT** define the entire island of Puerto Rico as a Metropolitan Area. Indeed, according to the most recent OMB MA list, which incorporates information from the 2000 census, Puerto Rico has **EIGHT** (8) Metropolitan Statistical Areas and **THREE** (3) Combined Statistical Areas (which are larger population areas consisting of combinations of Metropolitan Statistical Areas and/or Micropolitan Statistical Areas).¹⁰ According to the OMB’s Bulletin, Metropolitan Statistical Areas have “at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties”¹¹. Arbitron, presumably because of the geographic isolation of Puerto Rico from the United States and as a matter of convenience, simply defined the entire island as one market. However, the assumptions made in the *2002 Biennial Review Order* (i.e. “Radio stations compete in Arbitron markets”) do not hold true in Puerto Rico because of geography. For example, it is impossible for a station in Mayagüez to compete with a station in San Juan because intervening terrain and geography (including Mt. Cerro de Punta, at 4,390 feet), precludes each station’s signals from being heard in the other’s community. Yet, because of the Arbitron Metro definition encompassing the entire island, a Mayagüez station and a San Juan station are now presumed to be in the same radio market. The conclusion that stations in these cities would compete with each other for the same population (“*radio stations serve people, not land*”¹²) is entirely misplaced. The size (three times that of Rhode Island) and topography of the island makes such a conclusion a

⁷ *2002 Biennial Review Order* at 273

⁸ *2002 Biennial Review Order* at 276

⁹ see Arbitron Metro Map: (http://www.arbitron.com/downloads/Arb_US_Metro_Map_02.pdf)

¹⁰ see List 5, Attachments to OMB Bulletin 03-04

(http://www.whitehouse.gov/omb/bulletins/b03-04_attach.pdf)

¹¹ *Id.*

¹² *2002 Biennial Review Order* at 273

physical impossibility. It is precisely because of the unique character and topography of Puerto Rico that the Commission has long-established precedent in treating radio stations in Puerto Rico differently than those on the mainland United States. For example, the Commission recognized in *St. Croix Wireless Co., Inc.*, 8 FCC Rcd 7329, 74 Rad. Reg.2d (Pike & Fisher) 202 (1993) that adoption of alternative standards for purposes of determining protected and interfering contours was prudent and necessary to accommodate the greater permissible HAAT that Puerto Rico and Virgin Island stations antennas are allowed (to overcome geographic obstacles). This was later adopted as rule revision in the Commission's Second Report and Order in MM Docket 98-93 (*In the Matter of 1998 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules – FCC 00-368*), 15 FCC Rcd 2149 (2000), all as a result of the “unique topography” of the island (see Short-spaced FM Station Assignments by using Directional Antennas, *MM Docket 87-121, FCC 91-273, 6 FCC Rcd 5356* at 51); see also 47 C.F.R. §73.211(b)(3). Other examples include 47 C.F.R. §73.1210 (TV/FM Dual Language broadcasting in Puerto Rico) and 47 C.F.R. §73.807 (Minimum distance separation between LPFM stations). The geographic obstacles are further evident by the fact that there are a greater number of AM and FM stations licensed to the island of Puerto Rico than to a comparable geographic sized area in the mainland United States.¹³

ARSO suggests, in light of the foregoing evidence that the Arbitron “Metro” definition for Puerto Rico is *not* based on the OMB’s Metropolitan Areas, that the Commission, as part of this *Further Notice* proceeding, reconsider its decision in the *2002 Biennial Review Order* as it relates to Puerto Rico and that it;

- (1) define the local radio markets in Puerto Rico in accordance with the OMB’s eight (8) Metropolitan Statistical Areas on the island; or
- (2) create an exception for stations in Puerto Rico, as established by Commission precedent, and define the relevant local radio markets as the three (3) Combined Statistical Areas as defined by the OMB; or
- (3) remove Puerto Rico from the Arbitron Metro definition and include it in the pending rulemaking in Docket 03-130 for non-Arbitron surveyed markets.¹⁴

¹³ BIA reports there are 94 “Full Power” radio stations licensed to Puerto Rico. A check of the FCC’s CDBS database shows 71 licensed AM stations and 52 licensed FM stations (not including translators, boosters, licensed but silent stations, experimental stations and construction permits). The island is a rectangular shape of land approximately 35 miles north to south and 100 miles east to west.

¹⁴ The *Further Notice* indicates that the issues raised in Docket 01-130 will be addressed separately from the *Further Notice* (see *Further Notice*, fn 55).

As aptly noted by the Commission in the *2002 Biennial Review Order*, “people in the United States tend to be clustered around specific population centers”¹⁵. The same conclusion holds true for Puerto Rico, and thus it would be entirely appropriate to employ the first suggestion and define the relevant market as each of the eight (8) Metropolitan Statistical Areas as established and defined by the OMB. However, should the Commission believe this definition to be too narrow and not appropriate in light of its reasoning in the *2002 Biennial Review Order* as well as the directives of the 3rd Circuit in the *Prometheus* ruling, then ARSO suggests that the OMB’s Combined Statistical Areas (CSAs) for Puerto Rico, which divide the island into three (3) population areas, would be an appropriate definition. As a final alternative, Petitioner would suggest removing Puerto Rico from the Arbitron Metro definition (as has been demonstrated is wholly inappropriate as Arbitron’s definition is **NOT** the same as the OMB’s) and utilizing one of the definitions suggested for those markets which are not defined by Arbitron in the pending proceeding (MM Docket 03-130) as noted in the *2002 Biennial Review Order*¹⁶. Parenthetically, Petitioner would note that among the proposals in Docket 03-130 for defining the relevant market in non-Arbitron surveyed areas is to use the OMB’s Metropolitan Area (MA) definitions, (updated from the 2000 Census), which is also one of the Petitioner’s suggestions herein. Indeed, the Commission has, in similar contexts, used the OMB’s MA definitions for its purposes, such as defining “smaller markets” in the context of the new EEO rules.¹⁷

ARSO further comments on the issues raised in the Further Notice by suggesting that the current local radio ownership rule, as a whole, is not conducive to the public interest given the plethora of additional programming and information sources available to the consumer. In an era where, for example, programming is available on ipod devices, on your cellular telephone, on your wifi-enabled PDA or laptop, and via internet and satellite radio, those competitive sources of information and programming have significantly diminished the audience universe for terrestrial radio and have brought additional competitive pressures to local radio.

In order to compete against these new programming delivery systems, local radio needs regulatory flexibility and the ability to achieve efficiencies of scale in its operations to continue to be a vibrant and vital link to the public.

¹⁵ *2002 Biennial Review Order* at 273.

¹⁶ *2002 Biennial Review Order*, 657-670.

¹⁷ See 47 C.F.R. 73.2080(e) which uses OMB definitions and standards for defining “smaller market” for the purposes of determining the number of EEO initiatives a station must undertake during a license term.

Continuance of the local radio ownership rule in its current form runs counter to this new dynamic and hampers local radio owners' ability to compete with these new technologies that are not burdened with such regulations. While ARSO does not suggest the complete abolishment of the rule is necessary, it does suggest that further refinements to the rule to reflect the current state of information and entertainment delivery systems. These refinements would include relaxation of the rule in circumstances where there are a multitude of "voices" in the applicable media market, and a further refinement of the definition of "voices" to reflect the realities of the current media landscape.

Conclusion

For the foregoing reasons, ARSO favors substantive revision of the local radio ownership rule, but in the event it is retained in its current form, ARSO requests the relief requested in its previously filed Petition for Reconsideration, specifically that the Commission either (1) define the local radio markets in Puerto Rico as the OMB's eight (8) Metropolitan Statistical Areas; (2) define the local radio markets in Puerto Rico as the OMB's three (3) Combined Statistical Areas; or (3) remove Puerto Rico from the "Arbitron" defined definition of local radio market and define it in the same manner as "non-Arbitron" markets are defined in Docket 03-130.

Respectfully Submitted
/S/

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